IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 89/2004.
AND
CIVL APPLICATION NO. 209/2004

1. Shri Manohar Mahadev Verenkar,
about 67 years, married,
businessman,
2. Shri Mangaldas Mahadev Verenkar,
(since deceased) represented by :

2(a) Shanti Mangaldas Verenkar, widow of
the deceased aged 60 years,

2(b) Swarupa Mangaldas Verenkar,
daughter of deceased, aged 22 years,

2(c) Sampada Mangaldas Verenkar,
daughter of deceased applicant no.2
aged 22 years.

2(d) Samita Mangaldas Verekar
daughter of deceased applicant no.2.
Aged 18 years,

All residents of Opp. Bank of India,
Upper Bazar, Ponda, Goa.

3. Shri Mohan Mahadev Verenkar
(since deceased) represented by :

3(a) Smt. Madhavi M. Verenkar,
housewife;

3(b) Shri Prajay Manohar Verenkar,
son of Mohan Verenkar
minor through his guardian
appellant No.3(a).

All residents of Opp. Bank of India,

Upper Bazar, Ponda, Goa. ..... Appellants.

V/s.

1. Smt. Motibai alias Champa R.
Amonkar (since deceased) represented by :

1(a) Smt. Vidya Anirudra Bhangle, daughter of deceased respondent No.1, aged 48 years, married;

1(b) Shri Anirudra V. Bhangle, husband of 1(a) aged 50 years,
Both resident of Rajakhan Bhag,
Karwar 403 401.

1(c) Smt. Sugandha alias Sulabha Y. Falari daughter of deceased resp. no.1 aged 55 years, married,

1(d) Yeshwant/Anand Falari husband of 1(c) both residents of Thjorlem Bhat,
Pilar - Goa.

1(e) Smt. Sharad alias Shama S. Gawas, daughter of deceased resp. no.1 aged 52 years, married,

1(f) Shri Shamsunder Gawas, husband of 1(e), aged 54 years,
Both residents of Bharnewada,
Amona, Goa.

1(g) Smt. Baby alias Smita Satish Kamat, daughter of deceased resp. married, aged 35

1(h) Shri Satish Kamat,
husband of 1(g), aged 38 years,
Both residents of Vassundhara Co-op. Housing Society, Ravinagar,
Khadpaband, Ponda, Goa.

1(i) Shri Shivanand Ramnath Amonkar,
son of deceased respondent, bachelor,
aged 30 years,

1(j) Shailendra Ramnath Amonkar, son
of deceased resp. bachelor, aged 30 years,
Both residents of Vasundhara
Co-op. Housing Society,
Ravinagar Khadpaband, Ponda, Goa. ..... Respondents.

Mr. M. S. Usgaonkar, Senior Advocate with Mr. Sudesh Usgaonkar, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Mrs. Shambhavi Rao, Advocate for respondents No.1(f), 1(g), 1(i) and 1(j).

CORAM : P.V. KAKADE, J.

DATE : 30th August, 2006.

ORAL ORDER :

The unsuccessful defendants have preferred this second appeal against the Judgment and Order passed by the Additional District Judge, Panaji, dismissing their appeal and confirming the Judgment and Order passed by the Civil Judge, Sr. Division, Ponda, whereby the respondent's-plaintiff's suit came to be decreed and the perpetual as well as the mandatory injunction was issued against the present appellants to remove the pillars of masonry stones covered with asbestos sheets within the specified period.

2. The respondent-plaintiff came with a case that the property known as "Urdagal" alias "Hari Dalo Urdagal" alias "Predio Misto" situated at Upper Bazar, Ponda bearing Land Registration No.5592 of Book B-15 new and Matriz no.627 was standing in the name of Datta Purushottam Xete Verenkar, since deceased and in the said property there is, amongst others, a residential house registered under Matriz No.173 also registered in the name of said Datta Purushottam Xete Vernekar, (hereinafter, referred to as the "suit house" and the "suit property"). It was the plaintiff's case that the suit property including the suit house was purchased by said Datta Purushottam Xete Vernekar by a Deed of Sale dated 24.2.1904 and in the recent survey the suit property is surveyed under Survey No.156/10 and that the defendants being related to the plaintiff were permitted to stay in a portion of the house since the time of their father. But taking undue advantage of the ignorance of the plaintiff about survey operation and she being widow, defendant no.1, fraudulently and without the knowledge of the plaintiff managed to get his name inserted in the survey records and the plaintiff filed objection to delete the name of the defendant No.1. It is further averred that the defendants have their ancestral house at a distance of about 100 metres away from the suit property and that the wife of said Datta by name Saraswati alias Crishna, the mother of the plaintiff was alone and, therefore, the plaintiff started residing in the suit house with her

consent since more than 28 years and since then she is in possession and enjoyment of the suit property including the suit house. It is stated that by Deeds of Gift dated 20.7.76, and 19.1.80, the mother of the plaintiff gifted 3/4th part of the said property including the suit house to the plaintiff and reserved 1/4th to be gifted to her daughter. It was urged that the defendants without having any right, title or interest to the suit house, made preparations for extending the same in its plinth area towards its left and back sides and on the night of 11.2.81, the defendants hurriedly laid foundation, erected pillars of masonry stones and covered the roof by asbestos sheets from the eastern side of the suit house and also started constructing masonry house and masonry wall. Hence, the suit came to be filed against the defendants.

3. The defendants challenged the suit, inter alia, denying the allegations and claiming that the said property belongs to them by virtue of a Gift Deed. According to the defendants, the Gift Deeds in favour of the plaintiff are null and void and the construction done by them is in the property bearing Land Registration No.5592 belonging exclusively to them and not in the property belonging to the inheritance of the said Purushottam. They also stated that the said construction was done within the plinth area of a temporary shed existing therein which was used by

them as kitchen and on such other grounds sought dismissal of the suit.

4. The learned trial Judge, after hearing both the parties and on the basis of the available pleadings and the evidence, came to the conclusion that the plaintiff had proved his case and as such, decreed the suit. The appeal was preferred to the District Court, Panaji. The learned lower appellate Court Judge, on appreciating the evidence on record, came to the conclusion that the plaintiff had proved that the property bearing Survey No.156/10 was the one bearing Land Registration No.5592 and Matriz No.627. It was further held on the basis of the evidence that the plaintiff was owner in possession of the suit property along with the suit house bearing Matriz No.173. On the other hand, the defendants were held to have failed in proving that the suit construction fell in the property exclusively belonged to them and as such, the appeal came to be dismissed. Hence, the present appeal.

5. At the outset, I must note that the learned Counsel for both the parties took me through the evidential aspect involved in this matter. On critical perusal of the entire record, I am satisfied that there is no substantial question of law involved in this appeal and all the issues involved are issues of facts. It must also be noted that the substantial

question of law has to be distinguished from a substantial question of fact. In the present case before me, it was sought to be urged on behalf of the appellants that both the Courts below failed to appreciate that whatever rights the plaintiff's predecessor had to the house were not registered in the Land Registration Office and they were transferred for consideration in favour of one Vassudev Datta Xete Moraskar by Deed dated 14.12.1957 and, therefore, the plaintiff had no title in the suit property. Another question which was sought to be raised was to the effect that when the plaintiff's predecessor had no right to the suit house and the suit property, the gift deeds executed in the year 1976 and 1980 could not covey the rights in favour of the plaintiff. According to the learned Counsel for the appellants, the lower appellate Court has failed to consider that the private declaration dated 5.1.968 made by Vasudev Moraskar could not invalidate the conveyance for consideration made in his favour by public deed dated 14.12.1957, nor it could operate any reconveyance in favour of the respondents. Finally, it was submitted that the Courts below had misconstrued the document of title as well as the gift deeds and as such, the appeal was sought to be admitted.

6. However on perusing the relevant fact of the evidence vis-e-vis the Judgment of the lower appellate Court, I am satisfied that all these

issues sought to be raised are properly dealt with and there is no doubt whatsoever that it is not the case of non-consideration of evidence available, nor is it a case of perverse appreciation of evidence. In this regard, the dicta of the Apex Court in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and ors.** (1999) 3 SCC 722 wherein it is observed that the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under section 100 of the C.P. Code. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court, unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of earlier rulings of the Apex Court or was based upon inadmissible evidence or arrived at without evidence. In the present case before us, I am satisfied that the lower appellate Court has appreciated the available evidence on record in proper perspective. Therefore, it would brook no interference as the issues involved are issues of facts and there is

no substantial question of law involved at all.

7. In the result, the appeal stands dismissed with no order as to costs. Consequently, the Civil Application No. 209/2004 also stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.